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No. 95-704

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AKHTAR HAMID, *et al.*,
Petitioners,

v.

PRICE WATERHOUSE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision below properly applied this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in affirming the dismissal of RICO claims where the pleadings showed that plaintiffs lacked standing because the injury alleged was not proximately caused by the violations claimed.

2. Whether this Court's decision in *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S.Ct. 798 (1994), permits a plaintiff to survive a motion to dismiss by pleading a bare legal conclusion where the specific facts pleaded demonstrate that there is no claim for which relief may be granted.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the following is the identification of the parents and nonwholly owned subsidiaries of the corporate RESPONDENTS joining herein:

1. Respondents Bank of America NT&SA and BankAmerica Corporation:

693327 Ontario Limited
767-231 Holdings, Inc.
824 South Grand Associates
a pea in the pod, Inc.
Acadia Partners, L.P.
ACCEL/Exchange
Advanced Quick Circuits, Inc.
All Post, Inc.
Allied Shade Inc.
American Hardwood Co.
Ametech, Inc.
Anderson Lithograph, Inc.
Applied Medical Resources
Appold Japan Limited
Arr-Maz Management, Inc.
Arrendadora BankAmerica, S.A.
Auto Parts Club, Inc.
BA Futures, S.A.
BA Savings Bank
Bank of America (Asia) Limited
Bank of America Columbia
Bank of America International Limited
Bank of America, S.A.
BankAmerica Representacao e Servicos Limitada
Bankers Insurance Company, Ltd.
BATCO Nominees Limited
Bel Boy Apartments
Bunga Orkid, Ltd.
Cardinal Realty Services
CCFL Subordinated Debt Fund and Company, Limited Partnership

Certrum Properties Corporation
CIC Trading, S.A.
cirrus Technologies, Inc.
CONATEL Compania Nacional de Telefonos
Continental Banco, S.A.
Continental Illinois Servicos Ltda.
Continental Information & Technology Services Co., S.A.
Continental Investment Company, S.A.
Custom Acquisition Corp.
Dartford River Crossing Ltd.
David's Supermarket Inc.
Dynamic Health, Inc.
Elcon Industries, Inc.
Electro-Films
Electronic Broking Services
Electronics Designs
Electronic Payments Exchange, Inc.
Endar Corporation
Fiduciary Services Limited
Film Asset Holding Co.
Future Vision Television, Inc.
Garden Botanika Inc.
Global Map I.L.P. Investment
Golden Gate Participacoes Ltd.
FI Management Inc.
Home Technology Healthcare, Inc.
Hong Kong & Shanghai Insurance Co. Ltd.
Humphreys Inc.
IC Works, Inc.
Immusal, Inc.
Inchroy Credit Corporation Limited
Inversiones Aledo, C.A.
Inversiones Financieras SP Chile S.A.
Inversiones of America Corredores de Bolsa Limitada
InvestAmerica S.A.
IPEF Partners Limited
Italian Private Equity Fund Limited Partnership Italy
Itaparica, S.A. - Emprendimentos Turisticos

ITG Secretaries Limited
Justin, Inc. Chile Ltda.
KorAm Bank
La Jolla Pharmaceutical
Labco I, Inc., Chile Limitada
Laboratorios Chile, S.A.
Latin American Agribusiness Development Corporation S.A.
Les Dolomites Francaise, SARL
LNS Group, Inc.
Mallon Resources Corporation
Marks Brothers Jewelers
Massuh S.A.
MECA Software, L.L.C.
Merrill, Pickard, Anderson & Eyre I
Micro-Source CAD/CAM Inc.
Multi Banco S.A.
Multi-Distribuidora Internacional de Titulos e Valores Ltda.
Multi-Leasing International Arrendamento Mercantil S.A.
Mycenae FSC, Inc.
New Haven Manufacturing Corp.
Novasoft Systems, Inc.
Olefinas Del Zulia, S.A.
Opportunity Capital Partnership II
Pacific Linen, Inc.
Phaestos FSC, Inc.
Phonic Ear Holdings
Plastic Engineered Components, Inc.
Private Export Funding Corp.
Private Investments Syndicate Master-Venture
Quality Tubing, Inc.
Renfrew Services Limited
SABA Medical, Inc.
SABA Medical, L.P.
Savannah Bank of Nigeria
Security Pacific Leasing Canada, Ltd.
Severn River Crossing PLC

Sfuzzi, Inc.
Skye Bridge Limited
Societe Financiere Europeene S.A.
Societe Nouvelle Les Dolomites Francaises
South Coast Metro Center
SP Chile Energia S.A.
SP Inversiones & Servicios S.A.
SRDS, Inc.
Sun Sportswear, Inc.
Supermax Engineering
Sweet Factory, Inc.
System Integrators, Inc.
Tiryns FSC, Inc.
Titulos Rioplatenses S.A.
TransWestern Communications Company, Inc. (aka TCC, Inc.)
Vical Inc.
VTR Tele-Communicaciones S.A.

2. Respondent Hill & Knowlton:

WPP group, plc

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RESPONDENTS' BRIEF IN OPPOSITION

In their Petition for Writ of Certiorari ("Petition"), plaintiffs/petitioners (hereinafter simply "Plaintiffs") seek review of a decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of their ambitious attempt to pursue a massive class action asserting claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 19 U.S.C. §§ 1961-1968 (1994), purportedly on behalf of all depositors worldwide of the Bank of Credit and Commerce International and its affiliates (collectively, "BCCI").[1] After Plaintiffs had made four attempts at pleading cognizable claims—with the last being their Third Amended Complaint, comprising some 500 pages plus over 2000 pages of exhibits

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[1] Plaintiffs also urged a claim under the Alien Tort Statute, 28 U.S.C. § 1350 (Supp. V 1993), but they have not sought review of the Ninth Circuit's affirmance of the dismissal of this claim.

containing virtually every fact, rumor and speculation then published regarding BCCI—the district court dismissed the action below for lack of subject matter jurisdiction, lack of ripeness, failure to state a claim and lack of standing.[2] The court of appeals affirmed on the last of these grounds.

In their attempt to persuade this Court that the decision below is worthy of review, Plaintiffs have argued in their Petition: (1) that the decision breaks important new ground respecting transnational torts; (2) that it is in conflict with the decisions of other circuits; and (3) that it is inconsistent with this Court's decision in *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S. Ct. 798 (1994) ("*NOW*"). None of that is true. The decision below is an unremarkable application of the leading case on RICO standing, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) —a decision that Plaintiffs mention only in a footnote on the twenty-sixth page of their thirty page Petition—and is fully consistent both with the decisions of other circuits and with this Court's decision in *NOW*.

JURISDICTION

As discussed in the decision below (Ptr. App. A-5 to A-7), a serious threshold issue exists as to appellate jurisdiction. Plaintiffs did not file their notice of appeal from the district court judgment of April 30, 1992 until August 19, 1992. This belated notice of appeal would have timely invoked appellate review only if the time for seeking review was extended by reason of the filing of a post-judgment motion pursuant to Federal Rules of Civil Procedure 50(b), 52(b) or 59.[3] Plaintiffs filed a post-

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[2] The district court did not reach other grounds advanced by certain defendants, including the defenses of lack of personal jurisdiction and sovereign immunity. Petitioners' Appendix ("Ptr. App.") A-61.

[3] As the court of appeals notes in its opinion, the amendment to Fed. R. App. P. 4(a)(4) extending the time to appeal pending

judgment motion to set aside the April 30 judgment by reason of the supposed disqualification of the district judge, characterizing that motion as a motion under Rule 52(b). The court of appeals correctly noted that Rule 52(b) has no applicability to Plaintiffs' post-judgment motion. The court went on to hold, however, that it was bound by its own precedents to treat a motion to vacate an order of dismissal, even one made on grounds collateral to the merits of the judgment, as a motion under Rule 59 and to treat it as though Plaintiffs had invoked Rule 59 rather than Rule 52.[4] Respondents respectfully submit that this jurisdictional issue should have been decided the other way.

Although there is dictum in the decisions of this Court that is supportive of the Ninth Circuit's characterization of Plaintiffs' post-judgment motion, the decisions that more directly address the question support the proposition that an attack on a judgment that is predicated upon the collateral issue of the district judge's supposed disqualification is not cognizable under Rule 59. *Compare Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 n.11 (1988) (suggesting that a motion to vacate a judgment after trial by reason of judge's disqualification might be brought as part of motion for new trial), *with White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982) (motion collateral to the merits of judgment not cognizable under Rule 59) *and In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 (9th Cir. 1981) (disqualification motion is collateral to merits),

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resolution of a motion under Fed. R. Civ. P. 60 was not yet in effect at the time plaintiffs filed their notice of appeal below.

[4] In so concluding, the court of appeals appears to have overlooked some of its own precedents that suggest a contrary result. Thus, the Ninth Circuit has held in earlier decisions that a motion to alter or amend a judgment under Rule 59(e) is one that seeks "a substantive change of mind by the court." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 527 (9th Cir. 1983). A motion collateral to the merits seeks no such change of mind.

aff'd, 459 U.S. 1190 (1983). Plaintiffs' post-judgment motion is properly characterized as a motion under Rule 60, not Rule 59, and, as such, did not invoke Rule 4(a)(4) of the Federal Rules of Appellate Procedure and preserve appellate jurisdiction.

REASONS FOR DENYING THE WRIT

Plaintiffs' Petition commences (pages 4 to 13) with a lengthy exposition of the many sins committed by BCCI around the globe and of the worldwide notoriety generated by the revelation of those sins.[5] Having established the fact that BCCI was a bad bank—a fact that Respondents do not dispute—Plaintiffs then suggest that the conclusion of the court of appeals that they lack standing to prosecute their RICO claims provides solace to wicked foreigners and invites an explosion of transnational criminal activity:

> [The Ninth Circuit's decision] will create a gaping loophole in the ability of *all* U.S. citizens to protect themselves from or remedy injuries caused by offshore financial fraud. If uncorrected, the decision of the court below means that financial criminals can

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[5] In their exposition of BCCI's criminal activities and their consequences, Plaintiffs omit the fact that the depositor losses for which recovery is sought in this action did not take place in the United States. The Joint Provisional Liquidators of BCCI and the Superintendent of Banking of California have reported that BCCI assets at the U.S. agencies far exceed the deposit liabilities, and that deposits at the agencies will be completely repaid. Thus, as the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, Robert Mueller, reported to Congress:

> "Whatever massive fraud may have been perpetrated against depositors overseas, no such fraud occurred in the United States. And whatever massive losses depositors may have suffered overseas, no such losses occurred here."

Respondents' Appendix ("Res. App.") 2a; *see also* footnotes 4, 37 and 43 and related text in the district court's opinion (Ptr. App. A-27, -51 and -58).

> operate from offshore secrecy jurisdictions with impunity.

Petition at 16.

The decision below will, of course, do nothing of the sort.

The decision below opens no "gaping loophole" for transnational thieves. Indeed, the decision does not rely *at all* on the international character of BCCI for its treatment of Plaintiffs' RICO claims.[6] It was not the offshore nature of BCCI's criminal conduct that led the court of appeals to conclude that Plaintiffs lacked standing; it was the fact that Plaintiffs were indirect, and not direct, victims of that conduct. The court of appeals has not created a haven for offshore criminals. It has simply applied —and applied properly—this Court's holding in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 268, that a civil RICO claim requires that a claimant plead and prove that the injuries claimed were proximately caused by the RICO violations alleged.

I. THE DECISION BELOW PROPERLY APPLIED *HOLMES v. SIPC* TO AFFIRM THE DISMISSAL OF PLAINTIFFS' CLAIMS FOR LACK OF STANDING

In its discussion of RICO standing, the decision below commences with the observation that, under this Court's decision in *Holmes*, Plaintiffs were required to plead that "the defendants' violation of section 1962 was the proximate cause of their injury." Ptr. App. A-16. The court went on to observe that some of the predicate acts pleaded in Plaintiffs' Third Amended Complaint would have tended to increase, rather than decrease, BCCI's assets and, hence, the bank's ability to repay its deposi-

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[6] The district court had found a lack of subject matter jurisdiction due to the overwhelmingly foreign nature of BCCI's operation and the lack of any injury to depositors in the U.S. agencies of BCCI. The Ninth Circuit found it unnecessary to reach that issue.

tors.[7] For those violations, not even "but for" causation is present. Other wrongs alleged would have diminished the bank's assets and satisfied "but for" causation, but the causal connection alleged between those wrongs and depositor losses was *indirect* and did not supply proximate causation.

Since a depositor and his bank are in a creditor/debtor relationship, *Bank of Marin v. England*, 385 U.S. 99, 101 (1966), the court of appeals observed that the claims here are merely the complaint by creditors that their debtor was the victim of wrongdoing and now cannot repay its debts. Under well-established principles, such creditor claims are derivative and are not assertable by the creditor. *See, e.g., Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640-41 (9th Cir. 1988); *In re Sunrise Sec. Litig.*, 916 F.2d 874, 880-82 (3d Cir. 1990); *see generally* 1B *Michie on Banks and Banking* § 69, at 101-03 (repl. vol. 1993).

In arguing for a different result here, Plaintiffs rely on the argument to which they gave principle weight below—the assertion that this case complains not of wrongdoing that rendered BCCI insolvent and thus affected all creditors equally (which they apparently concede would leave them without standing) but rather of acts of fraud that induced them to make their deposits in the failing bank in the first place.[8] Petition at 22-30. The court of ap-

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[7] Plaintiffs alleged, for example, that BCCI diverted hundreds of millions of dollars from First American Bank to itself. Complaint ¶ 350(aa), Ptr. App. A-323.

[8] Plaintiffs attempt to add a rhetorical flourish to this argument by asserting that the Ninth Circuit's proper rejection of it amounts to a holding that their RICO claims "belong to BCCI . . . [which] is outrageous and compels reversal." Petition at 15. This assertion misses the point. Plaintiffs have no RICO injury under *Holmes* and thus no RICO claim. This is not to suggest that the present BCCI Liquidators do not have claims of their own to assert (whatever the merits of those claims may be). Indeed, those Liquidators are currently pursuing such claims against many of the respondents herein. *See* Res. App. 3a to 19a.

peals properly rejected this attempt to avoid the proximate cause requirement of *Holmes*.

The key to Plaintiffs' argument is their attempt to characterize their claims here as fraud claims particular to them as depositors rather than claims of wrongdoing affecting all creditors generally through the insolvency of the bank. In fact, no such claim appears. Plaintiffs do *not* base their RICO claims on the allegation that they were induced to act to their detriment in reliance on any misrepresentation directed at them by any defendant.

This omission in the pleadings is plainly the result of tactical deliberation and not confusion, as is evidenced by the fact that Plaintiffs did *not* seek leave from the district court to amend further on this point.[9] Plaintiffs have not pleaded fraud because they could not predicate a viable RICO claim on such a theory. Given that virtually all the BCCI depositors in the putative class reside abroad, any misrepresentation on which they could base a fraud claim would almost certainly have occurred abroad as well, making it highly unlikely that the act of fraud that proximately caused the loss would have been a predicate act under RICO.[10]

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[9] Plaintiffs' lead counsel expressly recited this election at the hearing before the district court:

> Just as the Court at some point must come to the position where it makes up its mind and rules, I guess at some point a pleader has to reach a point where the pleader feels he's pleaded everything that he reasonably can and that what has been pled is legally and factually sufficient to support his case, and I think we're there.

Res. App. 21a.

[10] Indeed, the only allegations of reliance by any named plaintiff on any alleged misrepresentation are those in paragraph 18(f) of the Complaint (Ptr. App. A-122) which assert that plaintiff Philip Merz relied on a 1981 advertisement placed by BCCI in the *Arab News* (a Jeddah, Saudi Arabia, publication) and on material emanating from BCCI's Luxembourg operations in 1988.

In an attempt to surmount this substantive impediment to their RICO theory, Plaintiffs elected *not* to plead that they relied upon misrepresentations that constitute U.S. mail or wire fraud—that is that they were *themselves* defrauded—but rather chose to present the claim that they were injured because *others* (principally bank regulators) were defrauded. The indirect nature of Plaintiffs' "fraud" theory is spelled out in their allegations respecting the causal nexus between their claimed injury and the twenty-eight predicate acts set forth in paragraphs 350(a)-(ag) of their Third Amended Complaint. For each of the predicate acts, the alleged causation is the same, or substantially so: the predicate acts

> helped the BCCI criminal enterprise to continue to operate. . . . BCCI would not have been able to continue its illegal operations and, thus, would not have been able to obtain Plaintiffs' deposits when it did . . . had these and other predicate acts not occurred. Each Plaintiff was thus defrauded into placing his, her or its money into a criminal enterprise instead of into a legitimate bank.

See, e.g., Complaint ¶ 350(f), Ptr. App. A-281-82.

In short, Plaintiffs use the term "fraud" to describe their allegation that BCCI was able to keep operating—and, hence, to continue to accept deposits—by hiding its wrongdoing from public scrutiny. By saying that they were "defrauded," Plaintiffs are simply claiming that their losses derive, not solely from the looting of BCCI itself, but also from the steps taken to conceal that looting—*i.e.*, (1) falsification of financial data regarding BCCI that kept its regulators at bay (*e.g.*, Complaint ¶ 350(m), Ptr. App. A-295-96); or (2) unlawful looting of other institutions, or other unlawful obtaining of funds, to maintain the illusion of solvency for the same purpose (*e.g.*, Complaint ¶ 350(y), Ptr. App. A-318-19).[11]

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[11] It is this formulation of "fraud" that is then parroted in the allegations, stated identically as to each individual plaintiff, that

This semantic shift in emphasis from the looting of BCCI itself to the steps allegedly taken to conceal that looting does not convert Plaintiffs' derivative claims to direct claims and does not turn "but for" causation into proximate causation. Virtually all looting cases will have an associated concealment case; thieves do not advertise their theft. If the simple rubric of shifting the focus of the Complaint from the looting itself to the inevitable cover-up gave standing—without regard to whether the claimant could plead and prove reliance on some misrepresentation directed at the claimant—the prohibitions against derivative and indirect RICO claims would cease to have practical significance.[12]

This precise argument was rejected by the Third Circuit in a decision that the court below properly characterized as persuasive, *In re Sunrise Securities Litigation*, 916 F.2d at 883.[13] In *Sunrise*, depositors of a savings

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each plaintiff "was defrauded into placing his deposits into a criminal enterprise." Complaint ¶ 18(a)-(m), Ptr. App. A-115 to A-132.

[12] Plaintiffs urged the same "fraud" characterization of their claims in *United States v. BCCI Holdings (Luxembourg), S.A.* Crim. No. 91-0655 (JHG) (D.D.C.), in an effort to lay claim to the funds subject to forfeiture. In arguing in its opposition that the circumstances here pleaded cannot make out a claim of fraud, the Department of Justice cogently observed:

> If it did, there would almost never be such a thing as a general creditor of a failed bank. Indeed, every depositor of an institution that failed as a result of unsound or fraudulent practice on the part of its directors would be entitled to claim that he or she was entitled to the return of the full value of his or her deposits instead of the pro rata distribution made by the bank's liquidator in such instances.

Res. App. 23a. Indeed, in that case, Plaintiffs later conceded that they were, in fact, simply general creditors of BCCI. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 9, 13 (D.D.C. 1993), *aff'd*, 46 F.3d 1185, *cert. denied*, —— U.S. ——, 115 S. Ct. 2613 (1995).

[13] Plaintiffs' attempts to distinguish *Sunrise* are unpersuasive. Their grounds are that: (1) it involved a motion for summary

and loan brought a RICO action against its directors, officers, auditors and outside counsel arising from the insolvency and federal takeover of the savings and loan. In an attempt to avoid dismissal of their claims on the ground that they were merely derivative of the institution's claims, Plaintiffs asserted there—as Plaintiffs do here—that their claims stemmed from defendants' concealment of the events causing the insolvency and their misrepresentation that the savings and loan was a secure and well run institution. Defendants' conduct, it was argued, "directly" injured the depositors and thus was not of a derivative nature. The district court disagreed, however, and granted summary judgment for the defendants. The Third Circuit affirmed, explaining:

> Plaintiffs lack standing to bring an individual suit against defendants on the basis of conduct that primarily injured Old or New Sunrise and only indirectly injured depositors because such a claim belongs to the institutions. We do not believe that plaintiffs can sidestep this prohibition for purposes of stating a RICO claim merely by framing their allegations as misrepresentations and the failure to disclose information. To hold otherwise would eviscerate RICO's standing requirement of injury to plaintiff's business or property by reason of the RICO violation.

916 F.2d at 883 (citations omitted); *see Leach v. Federal Deposit Ins. Corp.*, 860 F.2d 1266, 1273-74 (5th Cir. 1988) (shareholders do not have standing to bring RICO claims against former directors and officers of a bank for mismanagement and concealment of the bank's financial condition), *cert. denied*, 491 U.S. 905 (1989); *Crocker v. Federal Deposit Ins. Corp.*, 826 F.2d 347,

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judgment, not a motion to dismiss; (2) in *Sunrise* concealed mismanagement, not criminal looting, caused the loss; and (3) the FDIC was receiver in that case. Petition at 27 & n.26. Why any of these facts alters the analysis is a mystery that Plaintiffs make no attempt to explain.

350-52 (5th Cir. 1987) (same), *cert. denied*, 485 U.S. 905 (1988).

A clear illustration of the deficiency in Plaintiffs' claims on this score may be found by comparing *Sunrise*—where the Third Circuit found the claims to be derivative—with *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991)—where the same circuit found *different* claims to be direct. An important difference, the court of appeals explained, was that the latter claims contained the traditional elements of a claim of fraud lacking in *Sunrise*:

> In the instant case, by contrast [to *Sunrise*], the policyholders do not allege that PMM's actions caused Mutual Fire's insolvency, but rather that PMM wrongfully certified Mutual Fire's financial statements, *upon which the policyholders relied to their detriment.* In such a case, the policyholders have standing to sue PMM.

923 F.2d at 274 (emphasis added).

Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740 (5th Cir. 1989), cited by Plaintiffs themselves (Petition at 26 n.41), provides another example of this critical distinction. There the court dismissed as derivative creditors' RICO claims where the gravamen of the claim was unlawful conduct damaging to the debtor and allowed only those claims that were based on traditional fraud allegations. *Id.* at 746-47.

Koch Refining v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906 (1988), presents the same analysis framed in terms of "personal" claims assertable directly by the creditor and "general" claims assertable only by the debtor estate:

> A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. But allegations that could

> be asserted by any creditor could be brought by the trustee as a representative of all creditors. If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim.

Id. at 1348-49.

In the words of the *Koch* court, a claim that depositors were "defrauded" by the mere existence of BCCI is a claim that could be asserted by any creditor. It is general, not personal—indirect, not direct.[14]

Permitting claims by indirectly injured creditors such as these, in circumstances in which the Liquidators of BCCI are actively pursuing litigation against many of the parties named here as defendants, would not only potentially burden the courts of this country with the adjudication of the claims of one million BCCI depositors; it would also inject a huge element of complexity into ongoing litigation in this and other countries. As this Court observed in *Holmes*:

> [R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning

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[14] *Accord Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754 (10th Cir. 1989) ("Any remedy that affects, or potentially affects, all creditors belongs to the receiver, who asserts such claims for the benefit of all creditors."), *cert. denied*, 493 U.S. 1070 (1990); *Adato v. Kagan*, 599 F.2d 1111, 1117 (2d Cir. 1979) ("[a]s a general rule, wrongdoing by bank officers that adversely affects all depositors creates a liability which is an asset of the bank, and only the bank or its receiver may sue for its recovery. . . . Individual depositors may sue in their own right, however, if they have suffered a wrong that is distinctly theirs and not common to all"); *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993) (plaintiff shareholder and creditors of corporation denied standing under RICO to sue second shareholder and other defendants inside and out of the corporation because a creditor's injury is derivative of the corporation's and a shareholder similarly lacks standing unless the injury sustained is separate and distinct from that suffered by the corporation), *cert. denied*, 115 S. Ct. 292 (1994).

> damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. . . . [T]he need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

503 U.S. at 269-70 (citations omitted).[15]

II. THE DECISION BELOW IS WHOLLY CONSISTENT WITH THOSE OF OTHER CIRCUITS

Plaintiffs have not identified a single circuit decision that is at variance with either the holding or the reasoning of the Ninth Circuit here. The conflict in the circuits asserted by Plaintiffs simply does not exist.

The distinction discussed above between the claims pleaded here and fraud claims explains the difference in the result below and the result in most of the cases cited by Plaintiffs as examples of contrary decisions of other circuits. The decision of the Third Circuit in *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265 (3d Cir. 1991), and that of the Fifth Circuit in *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir. 1989), have already been discussed. The Third Circuit's decisions in *Hayes v. Gross*, 982 F.2d 104 (3d

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[15] The Ninth Circuit observed that these considerations applied here (Ptr. App. A-20), and similar attempts by these same named plaintiffs to pursue claims outside the BCCI liquidation proceedings in other proceedings have been rejected by the courts in those proceedings in part because their attempt to get ahead of other creditors in line would cause a "gargantuan disruption of the global liquidation proceedings currently underway" and would require the court to adjudicate the claims of approximately one million depositors. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F. Supp. 9, 14 (D.D.C. 1993), *aff'd*, 46 F.3d 1185, *cert. denied*, 115 S. Ct. 2613 (1995).

Cir. 1992), and *Riley v. Simmons*, 45 F.3d 764 (3d Cir. 1995), and the Fourth Circuit's decision in *Howard v. Haddad*, 916 F.2d 167 (4th Cir. 1990), are securities fraud cases in which plaintiffs were the investor targets of the fraud alleged, and not merely one of the many creditors derivatively and similarly injured by the insolvency of their debtor.

The Seventh Circuit's decision in *In re EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991), involved a fraud case involving mail and wire fraud directed at plaintiffs, complicated only by the fact that the plaintiffs were the first victims of a fraud that allegedly had as its ultimate goal the derivative defrauding of a governmental institution. *Id.* at 1279 (defendant "had to fool EDC's creditors [plaintiffs] in order to keep EDC going long enough to get the Pension Benefit Guaranty Corporation off [defendant's] back.").

The Seventh Circuit's decisions in *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989), and *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648 (7th Cir. 1984), are distinguishable on somewhat different grounds, as is the decision of the Second Circuit in *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289 (2d Cir. 1994). In each of those cases, the creditor-plaintiffs alleged that the debtor had been used as the tool of the defendants to cause an injury directed specifically at them and not at the debtor's creditors generally. As the Seventh Circuit noted in *Ashland*, the fact that plaintiffs' injury (their theft of plaintiffs' products) was distinct from that of other creditors was critical. *Id.* at 1280. That circumstance is not present here.[16]

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[16] Plaintiffs also cite *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), as being inconsistent with the decision below. It is not. In *Caplin*, this Court addressed the question of whether a bankruptcy trustee had standing to bring an action against an indenture trustee for breach of obligations *owed to debenture holders* under the indenture and the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa *et seq.* *Id.* at 425. The rights of the debenture

III. THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *NOW*

Plaintiffs also contend that the decision of the Ninth Circuit is in conflict with this Court's decision in *NOW* since Plaintiffs' prolix Third Amended Complaint contained, in addition to the specific allegations on which the Ninth Circuit based its decision, the conclusory allegation that they were injured in their business or property by reason of the alleged wrongdoing. It is apparently Plaintiffs' reading of *NOW* that it was this Court's intention that the talismanic recitation of such a conclusion insulates a RICO plaintiff from dismissal no matter how clearly the specific facts pleaded demonstrate the absence of proximate causation. Respondents find no such absurdity in the Court's decision.

Although conclusory pleadings may suffice to state a claim for relief under the liberal rules of federal notice pleading, it is well-established that such conclusory pleadings will not save a claim if the complaint also contains specific pleadings demonstrating its lack of merit. This principle was recently expressed by Chief Judge Posner of the Seventh Circuit about as well as it can be stated:

> [T]he Federal Rules of Civil Procedure do not require that a complaint describe the alleged wrongdoing of which it complains with any particularity. But if a Plaintiff does plead particulars, and they show that he has no claim, then he is out of luck—he has pleaded himself out of court. He is not saved by having pleaded a legal conclusion that if consistent with the facts would establish his right to relief, for he has shown that it is inconsistent with the facts.

Thomas v. Farley, 31 F.3d 557, 558-59 (7th Cir. 1994) (citations omitted).

There is nothing in *NOW* that suggests that this Court intended to overturn this sound principle. The portion of

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holders were direct and not derivative of any obligation owed to the debtor.

the Court's holding on which Plaintiffs rely is only that "general factual allegations of injury resulting from the defendant's conduct *may* suffice. . . ." —— U.S. ——, 114 S. Ct. at 803 (emphasis supplied). In so holding, the Court did no more than reaffirm the principle that well pleaded facts, even if sketchy, are deemed to be true in the context of a motion to dismiss.[17] The Court did not announce a special rule for pleading RICO standing that abrogates *Holmes*' prohibition of indirect claims—the claims in *NOW* were concededly direct. Nor did the Court suggest that, where (as here) the allegations are not general alone but include allegations of the specific basis for the general claim of causation, the courts must analyze the sufficiency of the pleadings with blinders on and ignore the deficiencies that render the claims unviable. The desperate assertion that such was the Court's intent in *NOW* only illustrates the bankruptcy of Plaintiffs' other arguments.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[17] The Court did not approve the use of bare legal conclusions in *NOW*. In upholding the sufficiency of the pleadings, the Court observed that the complaint included the specific allegations that "respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere . . . . In addition, petitioners claimed that respondent Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic. . . ." —— U.S. at ——; 114 S. Ct. at 803.

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Dated: December 1, 1995

APPENDIX

APPENDIX

[DoJ Logo]

DEPARTMENT OF JUSTICE

TESTIMONY OF

ROBERT S. MUELLER III
ASSISTANT ATTORNEY GENERAL

BEFORE THE

SENATE COMMITTEE ON FOREIGN RELATIONS
SUBCOMMITTEE ON TERRORISM, NARCOTICS,
AND INTERNATIONAL OPERATIONS

NOVEMBER 21, 1991

* * * *

[10] . . . . And the Federal Reserve, to its immense credit did its job. Unlike many of the nations in which BCCI did business, the United States did not permit BCCI to take deposits from its citizens. Whatever massive fraud may have been perpetrated against depositors overseas, no such fraud occurred in the United States. And whatever massive losses depositors may have suffered overseas, no such losses occurred here.

While BCCI may have acquired secret interests in several federally-insured American banks, notwithstanding the efforts of the Fed, the exposure of American citizens to financial losses could have been dramatically higher. The Federal Reserve refused time and again to permit BCCI to accept any deposits in the United States. What agencies and branches it was permitted to open were allowed only to make loans and otherwise to serve the customers of its overseas offices. American depositors

were thus spared the devastating personal losses caused by the bank in other countries around the world.

The work of the Federal Reserve has been largely overlooked in the rush to criticize the federal government's performance in the BCCI matter. What is also overlooked, however, is that the Department of Justice is not a bank regulatory agency. The Department of Justice does not audit or examine banks. It has no power to regulate the conduct of banks, or even to close them in the wake of criminal activity. It must prove its charges beyond a reasonable doubt, not according to the lower civil standard of proof enjoyed by bank regulators.

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1992-B-No. 2591

BETWEEN:

BANK OF CREDIT AND COMMERCE INTERNATIONAL HOLDINGS (LUXEMBOURG) SA
Plaintiff

- and -

(1) ERNST & WHINNEY (a firm carrying on business in England and elsewhere in the world)

(2) ERNST & YOUNG (a firm carrying on business in England and elsewhere in the world)

(3) ERNST & WHINNEY (a firm)

(4) ERNST & YOUNG (a firm)

(5) ERNST & WHINNEY Societe Civile

(6) ERNST & YOUNG Societe Civile

(7) MONTBRUN, ERNST & YOUNG S.A R.L.

(8) KENNETH HAY

(9) GUY HORNICK

(10) ROGER DILLIEN

(11) LUDO SWOLFS

(12) JAN DE DECKER

(13) J DAVID HUMPHREYS

(14) DANIEL VAN CUTSEM

(15) E.O.M. EILLEDGE (sued in his personal capacity and on behalf of himself and of all the other members of and/or all other persons carrying on the business (inter alia) of accountants, auditors and advisers under the names of the Defendants (1) to (7) above)

Defendants

TO THE DEFENDANTS:

The First and Third Defendants Ernst & Whinney and the Second and Fourth Defendant Ernst & Young each of whose place of business is at Becket House, 1 Lambeth Palace Road, London SE1 7EU

The Fifth Defendant Ernst & Whinney Societe Civile whose registered office is at 25B Boulevard Royal, 2449 Luxembourg

The Sixth Defendant Ernst & Young Societe Civile whose registered office is at 6 Avenue Emile Reuter, 2420 Luxembourg

The Seventh Defendant Montbrun, Ernst & Young S.A R.L. whose registered office is at 11 Boulevard du Prince Henri, 1724 Luxembourg

The Eighth Defendant Kenneth Hay, the Ninth Defendant Guy Hornick, the Tenth Defendant Roger Dillien, the Eleventh Defendant Ludo Swolfs each of whose place of business is Avenue Emile Reuter, 2420 Luxembourg

The Twelfth Defendant Jan de Decker, whose address is Stationstraat 24, B-9308 Gijzegem, Belgium

The Thirteenth Defendant J David Humphreys whose address is Chemin des Messes, 26, B-1380 Lasne, Belgium

The Fourteenth Defendant Daniel Van Cutsem whose address is Nachtegalenlaan 76, B-3080 Tervuren, Belgium

The Fifteenth Defendant E.O.M. Eilledge whose place of business is at Becket House, 1 Lambeth Palace Road, London SE1 7EU

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiff in respect of the claim set out overleaf.

Within 14 days after the service of this Writ on the First to Fourth Defendants inclusive and the Fifteenth Defendant and within 21 days after the service of this Writ on

the Fifth to Fourteenth Defendants inclusive, counting the day of service, you must either satisfy the claim or return to the Court Office mentioned below the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiff may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued from the Chancery Chambers of the High Court this 6th day of March 1992.

NOTE: This Writ may not be served later than 4 calendar months (or if leave is required to effect service out of the jurisdiction, 6 months) beginning with that date unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

The Plaintiff which is a company duly constituted and incorporated under the laws of the Grand Duchy of Luxembourg is and was at all material times entitled and empowered by the laws of the said Grand Duchy to make the contract hereafter mentioned and to sue and be sued in its name above-mentioned, claims against the Defendants for:—

(1) damage and/or compensation for negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty in and about: —

(a) their agreement to audit and/or their audit of and/or their participation in the audit of the Plaintiff in respect of its financial year ending 31st December 1986;

(b) their agreement to prepare and/or their preparation of and/or their participation in the preparation of, accounts and/or financial statements and/or reports and/or reviews on and in relation to the Plaintiff and/or its business and affairs in respect of its financial year ending 31st December 1986;

(c) their provision of auditing and/or accounting and/or other related or allied services to the Plaintiff during the 3 month period immediately after the year ending 31st December 1986;

(2) interest;

(3) costs;

(4) further and other relief.

This Court has power under and by virtue of the Civil Jurisdiction and Judgments Act 1982 to hear and determine the claims made in this writ and no proceedings involving the same causes of action are pending between the parties in Scotland, Northern Ireland or any other Contracting State as defined in Section 1(3) of that Act.

This Writ was issued by Lovell White Durrant of 65 Holborn Viaduct, London EC1A 2DY, reference L1/JMcK/APT, solicitors for the said Plaintiff which is a company duly constituted and incorporated under the laws of the Grand Duchy of Luxembourg and whose registered office is at 39 Boulevard Royal, 2449 Luxembourg. The writ is issued on the authority of the Plaintiff's board and with the approval of the Commissaires appointed by the Luxembourg Court on 1st August 1991.

/s/ Lovell White Durrant
Solicitors for the Plaintiff

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BETWEEN:

BANK OF CREDIT AND COMMERCE
INTERNATIONAL HOLDINGS
(LUXEMBOURG) SA

Plaintiff

- and -

(1) ERNST & WHINNEY (a firm carrying on business in England and elsewhere in the world)

AND OTHERS

Defendants

WRIT AND STATEMENT OF CLAIM

Lovell White Durrant
65 Holborn Viaduct
London EC1A 2DY

Tel: 071-236 0066
Ref: L1/JMcK/APT

Solicitors for the Plaintiff

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BETWEEN:

(1) BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED (IN LIQUIDATION)

(2) BANK OF CREDIT AND COMMERCE INTERNATIONAL HOLDINGS (LUXEMBOURG) S.A.

(3) BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A. (IN LIQUIDATION)

Plaintiffs

—and—

(1) PRICE-WATERHOUSE (a firm carrying on business in England and elsewhere in the world)

(2) PRICE-WATERHOUSE (a firm)

(3) PRICE WATERHOUSE (a firm having a place of business in the Cayman Islands and carrying on business, inter alia, in England)

(4) CHRISTOPHER COWAN

(5) EDWARD WILSON HOULT

(6) RICHARD PHILIP KILSBY

(7) CHRISTOPHER BULL

(8) RONALD WALTER WHITE

(9) M.E. AUSTEN

(10) RICHARD WILLIAM HARRIS

(11) RICHARD PEEK

(12) TREVOR GORMAN

(13) ERNEST GRINROD

(14) MAITLAND CATES

(15) BARRY NOTTAGE

(16) THOMAS HACKETT

(17) LENWORTH SMITH

(18) IAN BRINDLE (sued in his personal capacity and on behalf of himself and of all the other members of and/or all other persons carrying on the business (inter alia) of accountants, auditors and advisers under the names of the Defendants (1) to (3) above)

(19) PRICE WATERHOUSE INTERNATIONAL also known as PRICE WATERHOUSE WORLD FIRM (a firm registered in Bermuda and carrying on business in England and elsewhere in the world)

(20) ERNST & WHINNEY (a firm carrying on business in England and elsewhere in the world)

(21) ERNST & YOUNG (a firm carrying on business in England and elsewhere in the world)

(22) ERNST & WHINNEY (a firm)

(23) ERNST & YOUNG (a firm)

(24) ERNST & WHINNEY Societe Civile

(25) ERNST & YOUNG Societe Civile

(26) MONTBRUN, ERNST & YOUNG S.A R.L.

(27) KENNETH HAY

(28) GUY HORNICK

(29) ROGER DILLIEN

(30) LUDO SWOLFS

(31) JAN DE DECKER

(32) J DAVID HUMPHREYS

(33) DANIEL VAN CUTSEM

(34) C.E.G. CARTWRIGHT

(35) G.R. SMITH

(36) E.O.M. EILLEDGE (sued in his personal capacity and on behalf of himself and of all the other members of and/or all other persons carrying on the business (inter alia) of accountants, auditors and advisers under the names of the Defendants (20) to (26) above)

Defendants

TO THE DEFENDANTS:

The First, Second and Third Defendants Price Waterhouse each of whose place of business is at Southwark Towers, 32 London Bridge Street, London SE1 9SY

The Fourth Defendant Christopher Cowan whose address is 36 Plantation Road, The Peak, Hong Kong

The Fifth Defendant Edward Wilson Hoult, the Sixth Defendant Richard Philip Kilsby, the Seventh Defendant Christopher Bull, the Eighth Defendant Ronald Walter White and the Ninth Defendant M.E. Austen each of whose place of business is at Southwark Towers, 32 London Bridge Street, London SE1 9SY

The Tenth Defendant Richard William Harris whose place of business is at British American Centre, PO Box 258, George Town, Grand Cayman

The Eleventh Defendant Richard Peek whose address is Lime Tree Bay, PO Box 258, West Bay Road, Cayman Islands and/or PO Box 30144, Seven Mile Beach, Grand Cayman

The Twelfth Defendant Trevor Gorman whose address is West Bay Street, PO Box N-1516, Nassau, Bahamas and/or 8 Springbank, Eversley Park Road, Winchmore Hill, London N21 1JM

The Thirteenth Defendant Ernest Grinrod whose address is Bay View, East Bay Street, PO Box 55-6882, Nassau, Bahamas

The Fourteenth Defendant Maitland Cates whose address is Chancery House, Corner of Hall and Explorers' Way, PO Box F2415, Freeport, Bahamas

The Fifteenth Defendant Barry Nottage whose address is Eastern Road, Winton Highway, PO Box N7775, Nassau, Bahamas

The Sixteenth Defendant Thomas Hackett whose address is Providence House, PO Box N-3910, Nassau, Bahamas

The Seventeenth Defendant Lenworth Smith whose address is Providence House, PO Box N-3910, Nassau, Bahamas

The Eighteenth Defendant Ian Brindle whose place of business is at Southwark Towers, 32 London Bridge Street, London SE1 9SY

The Ninteenth Defendant Price Waterhouse International whose place of business is at Southwark Towers, 32 London Bridge Street, London SE1 9SY

The Twentieth and Twenty-second Defendants Ernst & Whinney and the Twenty-first and Twenty-third Defendants Ernst & Young each of whose place of business is at Becket House, 1 Lambeth Palace Road, London SE1 7EU

The Twentieth-fourth Defendant Ernst & Whinney Societe Civile whose registered office is at 25B Boulevard Royal, 2449 Luxembourg

The Twenty-fifth Defendant Ernst & Young Societe Civile whose registered office is at 6 Avenue Emile Reuter, 2420 Luxembourg

The Twenty-sixth Defendant Montbrun, Ernst & Young S.A. R.L. whose registered office is at 11 Boulevard du Prince Henri, 1724 Luxembourg

The Twenty-seventh Defendant Kenneth Hay, the Twenty-eighth Defendant Guy Hornick, the Twenty-ninth Defendant Roger Dillien, the Thirtieth Defendant Ludo Swolfs, the Thirty-fourth Defendant C.E.G. Cartwright and the Thirty-fifth Defendant G.R. Smith each of whose place of business is at 6 Avenue Emile Reuter, 2420 Luxembourg

The Thirty-first Defendant Jan de Decker, whose address is Stationstraat 24, B-9308 Gijzegem, Belgium

The Thirty-second Defendant J David Humphreys whose address is Chemin des Messes, 26, B-1380 Lasne, Belgium

The Thirty-third Defendant Daniel Van Cutsem whose address is Nachtegalenlaan 76, B-3080 Tervuren, Belgium

The Thirty-sixth Defendant E.O.M. Eilledge whose place of business is at Becket House, 1 Lambeth Palace Road, London SE1 7EU

THIS WRIT OF SUMMONS has been issued against you by the above-named Plaintiffs in respect of the claim set out overleaf.

Within 14 days after the service of this Writ on the First to Third, Fifth to Ninth, Eighteenth, Nineteenth, and Twentieth to Twenty-third Defendants inclusive and within 21 days after the service of this Writ on the Fourth, Tenth to Seventeenth, Twenty-fourth to Thirty-sixth Defendants inclusive, counting the day of service, you must either satisfy the claim or return to the Court Office mentioned below the accompanying Acknowledgment of Service stating therein whether you intend to contest these proceedings.

If you fail to satisfy the claim or to return the Acknowledgment within the time stated, or if you return the Acknowledgment without stating therein an intention to contest the proceedings, the Plaintiffs may proceed with the action and judgment may be entered against you forthwith without further notice.

Issued from the Chancery Chambers of the High Court this 12th day of March 1992.

NOTE: This Writ may not be served later than 4 calendar months (or if leave is required to effect service out of the

jurisdiction, 6 months) beginning with that date unless renewed by order of the Court.

IMPORTANT

Directions for Acknowledgment of Service are given with the accompanying form.

A. The First Plaintiff which is a company duly constituted and incorporated under the laws of the Cayman Islands is now in liquidation. The Plaintiff is and was at all material times entitled and empowered by the laws of the said Cayman Islands to make the contracts hereinafter mentioned and to sue and to be sued by its name above-mentioned, and claims against the First to Eighteenth Defendants for:

(1) damages and/or compensation for negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty in and about:—

(a) their agreement to audit and/or their of audit of and/or their participation in the audit of the First Plaintiff in respect of its financial year ending 31st December 1985;

(b) their agreement to prepare and/or their preparation of and/or their participation in the preparation of accounts and/or financial statements and/or reports and/or reviews on and in relation to the Plaintiffs and/or their business and affairs in respect of their financial year ending 31st December 1985;

(c) their agreement to prepare and/or their preparation of and/or their participation in the preparation of a report to the directors of the First Plaintiff dated 18th March 1986;

(d) their preparation of and/or their review of and/or their reporting on and/or their participation in the review and/or preparation of accounts, reports and other information prepared in relation to the business and affairs of the Plaintiffs pursuant to a letter from the Institut Monetaire Luxembourgeois ("IML") to the directors of the Second Plaintiff dated 21st October 1985;

(e) their provision of auditing and/or accounting and/or other related or allied services to the Plaintiffs in and/or before 1986;

(2) interest;

(3) costs;

(4) further and other relief.

B. The First Plaintiff's claim against the Twentieth to Thirty-sixth Defendants is for:—

(1) damages and/or compensation for negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty in and about:—

(a) their agreement to audit and/or their audit of and/or their participation in the audit of the Second and/or Third Plaintiffs in respect of their financial years ending 31st December 1985;

(b) their agreement to prepare and/or their preparation of and/or their participation in the preparation of accounts and/or financial statements and/or reports and/or reviews on and in relation to the Plaintiffs and/or their business and affairs in respect of their financial years ending 31st December 1985;

(c) their preparation of and/or their review of and/or their reporting on and/or their participation in the review and/or preparation of accounts, reports and other information prepared in relation to the business and affairs of the Plaintiffs pursuant to a letter from the IML to the directors of the Second Plaintiff dated 21st October 1985;

(d) their provision of auditing and/or accounting and/or other related or allied services to the Plaintiffs in and/or before 1986;

(2) interest;

(3) costs;

(4) further and other relief.

C. The Second Plaintiff is a company duly constituted and incorporated under the laws of the Grand Duchy of Luxembourg. The Third Plaintiff is a company duly constituted and incorporated under the laws of the Grand Duchy of Luxembourg and is now in liquidation. The Second and Third Plaintiffs are and were at all material times entitled and empowered by the laws of the said Grand Duchy to make the contracts hereinafter mentioned and to sue and to be sued by their names above-mentioned, and claim against the First to Eighteenth Defendants for:—

(1) damages and/or compensation for negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty in and about:—

(a) their agreement to audit and/or their audit of and/or their participation in the audit of the First Plaintiff in respect of its financial year ending 31st December 1985;

(b) their agreement to prepare and/or their preparation of and/or their participation in

the preparation of accounts and/or financial statements and/or reports and/or reviews on and in relation to the Plaintiffs and/or their business and affairs in respect of their financial year ending 31st December 1985;

(c) their agreement to prepare and/or their preparation of and/or their participation in the preparation of a report to the directors of the First Plaintiff dated 18th March 1986;

(d) their preparation of and/or their review of and/or their reporting on and/or their participation in the review of and/or preparation of accounts, reports and other information prepared in relation to the business and affairs of the Plaintiffs pursuant to a letter from the IML to the directors of the Second Plaintiff dated 21st October 1985;

(e) their provision of auditing and/or accounting and/or other related or allied services to the Plaintiffs in and/or before 1986;

(2) interest;

(3) costs;

(4) further and other relief.

D. The Second and Third Plaintiffs' claim against the Twentieth to Thirty-six Defendants is for:

(1) damages and/or compensation for negligence and/or breach of duty and/or breach of contract and/or breach of statutory duty in and about:—

(a) their agreement to audit and/or their audit of and/or their participation in the audit of the Second and Third Plaintiffs in re-

spect of their financial years ending 31st December 1985;

(b) their agreement to prepare and/or their preparation of and/or their participation in the preparation of accounts and/or financial statements and/or reports and/or reviews on and in relation to the Plaintiffs and/or their business and affairs in respect of their financial years ending 31st December 1985;

(c) their preparation of and/or their review of and/or their reporting on and/or their participation in the review of and/or preparation of accounts, reports and other information prepared in relation to the business and affairs of the Plaintiffs pursuant to a letter from the IML to the directors of the Second Plaintiff dated 21st October 1985;

(d) their provision of auditing and/or accounting and/or other related or allied services to the Plaintiffs in and/or before 1986;

(2) interest;

(3) costs;

(4) further and other relief.

E. The Plaintiffs' claim against the Nineteenth Defendant is for:—

(1) damages and/or compensation for negligence and/or breach of duty in and about:—

(a) their maintenance and development of the ability and readiness of the First to Eighteenth Defendants to provide the highest standards of service both generally and specifically in relation to the matters set

out in paragraphs A(1)(a) to (e) and C(1)(a) to (e) above; and

(b) their establishment and maintenance of high and uniform standards of work and conduct by the First to Eighteenth Defendants both generally and specifically in relation to the matters set out in paragraphs A(1)(a) to (e) and C(1)(a) to (e) above;

(2) interest;

(3) costs;

(4) further and other relief.

This Court has power under and by virtue of the Civil Jurisdiction and Judgments Act 1982 to hear and determine the claims made in this writ against the Twenty-fourth to Thirty-sixth Defendants and no proceedings involving the same clauses of action pending between the parties in Scotland, Northern Ireland or any other Contracting state as defined in Section 1(3) of that Act.

/s/ Lovell White Durrant

This Writ was issued by Lovell White Durrant of 65 Holborn Viaduct, London EC1A 2DY, reference L1/JMcK/APT, solicitors for the said Plaintiffs.

The First Plaintiff is a company in liquidation, whose registered office is at Ansbacher House, Fort Street, George Town, Grand Cayman. The liquidators are Ian Wight, Robert Axford and Michael Mackey, all of Fort Street, PO Box 1359, Grand Cayman, Cayman Islands.

The Second Plaintiff's registered office is at 39 Boulevard Royal, 2449 Luxembourg. This writ is issued on the authority of the Plaintiff's board and with the approval of the Commissaires appointed by the Luxembourg Court on 1st August 1991.

The Third Plaintiff is a company in liquidation, whose registered office is at 25C Boulevard Royal, 2449 Luxembourg. The liquidators are Brian Smouha of Friary Court, 65 Crutched Friars, London EC3N 2NP, Georges Baden of 8 Boulevard Royal, 2449 Luxembourg and Julien Roden of 7 Avenue des Archiducs, 1135 Luxembourg.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV91-4483-CBM(EX)

AKHTAR HAMID, *et al.*,
Plaintiffs,

vs.

PRICE WATERHOUSE & CO., *et al.*,
Defendants.

Los Angeles, California
Monday, March 30, 1992
10:10 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

* * * *

[10]

MR. LERACH: And of course, we would suggest that proximate cause is, in fact, a factual issue. There may be some circumstances under which it could be said to be lacking as a matter of law, but we don't think this case is one of those, and I would note that *Holmes* itself was a summary judgment opinion, not a motion to dismiss.

It is difficult to say to the Court that there is much more of significance that could be alleged in this complaint.

Just as the Court at some point must come to the position where it makes up its mind and rules, I guess at some point a pleader has to reach a point where the pleader feels he's pleaded everything that he reasonably can and that what has been pled is legally and factually sufficient to support his case, and I think we're there.

THE COURT: Does that—there were a couple of occasions where the Court said that it wasn't satisfied that the allegations were sufficient and invited Plaintiff to demonstrate this morning in your argument that, if given the opportunity to amend further, that in fact there would be something more that you could allege that might satisfy the problem that the Court identified.

* * * *

[Filed Jan. 27, 1993]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Number 91-0655 (JHG)
Defendants 01-04

UNITED STATES OF AMERICA

v.

BCCI HOLDINGS (LUXEMBOURG), S.A.; BANK OF CREDIT AND COMMERCE INTERNATIONAL, S.A.; BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED; and INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED,

Defendants

GOVERNMENT'S REPLY TO OPPOSITIONS TO MOTION TO DISMISS ROUND TWO PETITIONS OF BCCI TORT PETITIONERS

The United States of America, by and through its undersigned attorneys, makes this reply to the oppositions to the government's Motion to Dismiss Round Two Petitions of BCCI Tort Petitioners ("Motion to Dismiss") filed by the Central Reserve Bank of Peru ("Peru"), Lee and Patricia Scarfone, et al. ("Scarfone"), and the depositors in the California RICO Class Action against BCCI ("CRCA Petitioners").

I. BACKGROUND

On December 28, 1992, the government filed a Motion to Dismiss the Round Two claims of the three above-referenced Petitioners, arguing that the Petitioners lacked

standing to file a claim pursuant to 18 U.S.C. § 1963(1) (an "L-claim") and that Petitioners had failed to state any claim upon which relief could be granted.

* * * *

[25] . . . . If it did, there would almost never be such a thing as a general creditor of a failed bank. Indeed, every depositor of an institution that failed as a result of unsound or fraudulent practice on the part of its directors would be entitled to claim that he or she was entitled to the return of the full value of his or her deposits instead of the pro rata distribution made by the bank's liquidator in such instances. Without going into a lengthy recitation of legal precedents involving the FDIC's liquidation of failed banks in the United States, the government is confident in asserting that the theory advanced by the Petitioners does not accurately reflect the state of the law on this point.[12]

G. The Petitioners did not acquire any interest in BCCI's property as bona fide purchasers for value.

Finally, notwithstanding the holdings in *Lavin* and *Mageean, supra*, Peru and Scarfone persist in describing themselves as "bona fide purchasers for value" who are entitled to recover under § 1963(1)(6)(B). Peru Brief at 12; Scarfone Brief at 6. Having eschewed the status of "tort claimant," the Petitioners rely on *Reckmeyer*, which held that unsecured general creditors may be considered bona fide purchasers for purposes of § 1963(1). 836 F.2d at 208. Peru Brief at 15; Scarfone Brief at 7.

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[12] *See Langely v. FDIC*, 484 U.S. 86 (1987); *Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir. 1990), *cert. denied* 111 S. Ct. 954 (1991); *FSLIC v. Gordy*, 928 F.2d 1558 (11th Cir. 1991).